

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP2696

Cir. Ct. No. 2011TP24

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN THE INTEREST OF BREYANNA L. C., A PERSON UNDER THE AGE OF 18:

JENNA L. C.,

PETITIONER-RESPONDENT,

V.

DUSTIN J. K. V.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Walworth County:

DAVID M. REDDY, Judge. *Affirmed.*

¶1 GUNDRUM, J.¹ Dustin J. K. V. appeals from the order terminating his parental rights to Breyanna L. C. on the ground that he failed to assume parental responsibility. *See* WIS. STAT. § 48.415(6). He argues that he was deprived of the effective assistance of counsel when his trial counsel failed to object during the fact-finding hearing to evidence related to acts that occurred before Dustin learned his girlfriend Jenna L. C., Breyanna’s mother, was pregnant. He also argues that a new trial is warranted in the interest of justice because the admission of that same evidence meant his trial was fundamentally unfair and the “real controversy” was not fully tried. Because Dustin has not established that his trial counsel was ineffective or that the interest of justice requires a new trial, we affirm.

Background

¶2 Dustin and Jenna met at a party in early 2011 and began a relationship in which they were sexually active. Some time in April 2011, Jenna learned she was pregnant and informed Dustin. That child, Breyanna, was born in December 2011 and went home from the hospital with her prospective adoptive family.² Jenna filed a petition to involuntarily terminate Dustin’s parental rights a few days after Breyanna’s birth.

¶3 The following took place at the fact-finding hearing related to Jenna’s petition. Based upon questions from Jenna’s counsel and without objection by Dustin’s, both Jenna and Dustin testified that Dustin was arrested in

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² Jenna voluntarily terminated her rights to Breyanna.

Illinois in March 2011 for an offense related to the delivery of marijuana. Also pursuant to questioning from Jenna's counsel and without objection by Dustin's, both parties testified regarding Jenna bailing Dustin out of jail, with Jenna stating that Dustin had asked her to bail him out. Jenna further testified that she did so on April 1, 2011, by taking out high-interest loans and selling personal items, and that Dustin never paid, nor offered to pay, her back. Dustin testified that he ultimately pled guilty to the March 2011 charge and received a fine.

¶4 Pursuant to her counsel's questioning and without objection by Dustin's counsel, Jenna testified that she lost her job at McDonald's on April 1, 2011, because there were "[t]oo many problems at work," explaining that Dustin would "hang around and come through the drive-thru multiple times" to talk to her. She further testified that she had observed Dustin "dealing" marijuana in the McDonald's parking lot.

¶5 Jenna testified that later that month or in May, after both parties became aware of Jenna's pregnancy and were living together at Jenna's parents' home, Jenna gave Dustin a ride to Rockford, Illinois and, during that ride, she told Dustin that she wanted to break up. Dustin became upset and repeatedly tried to jump out of the vehicle while Jenna was driving, including on the interstate, and she had to "whip[]" the car to the side of the road. She testified that she injured her finger during this incident and was concerned for her safety and that of her unborn child because she "wasn't able to pay attention to the road." She eventually pulled over the vehicle and walked to a gas station to have her father pick her up. The police became involved in the incident because a third party called the police indicating that the party observed Dustin strike Jenna. During his testimony, Dustin acknowledged an incident similar to this occurred at a time after he knew of the pregnancy.

¶6 Jenna further testified that during the time they were living together, including after Dustin learned of the pregnancy, Dustin never provided her with any support, never paid for any food or other expenses, and smoked marijuana around her on a daily basis. Dustin's sister and mother testified that they knew Dustin had a drug problem before going to prison, with his sister adding that she was aware Dustin was in prison for "a crime regarding drugs." Dustin testified that he was in prison because he was convicted on two counts of manufacturing and delivering marijuana and was convicted as a "repeater" on charges of theft, criminal damage to property, and disorderly conduct. He explained that "repeater" meant that he "re-offended." Heather, a woman Dustin lived with in the weeks following the break up with Jenna, testified that Dustin was arrested and jailed, apparently on the latter charges, in June 2011 for "[s]lashing my neighbor's tires and breaking into people's cars and houses." Dustin testified that he had been sentenced on all the charges to eighteen months of confinement with an additional two years of extended supervision and that he had been continuously incarcerated from the time of his June 2011 arrest until the hearing. Dustin acknowledged that he makes some, though little, money in prison and that it goes to pay for restitution for the nondrug-related crimes for which he was arrested in June 2011.

¶7 Dustin testified that he had been smoking marijuana since he was six years old and that he did so on a daily basis when he met Jenna, but that he stopped selling and using marijuana after learning of the pregnancy. He also acknowledged that it was a condition of his pretrial release that he not use drugs.

¶8 Jenna testified that Dustin was in a gang and had a related street name and tattoo, and that, after learning of the pregnancy, Dustin never gave her any indication he had left the gang. Dustin's sister and mother also testified to Dustin's gang involvement, as did Patrick, who was the father of a different child

of Jenna's and who Jenna began seeing again after breaking up with Dustin. Patrick testified to his fear of Dustin due to Dustin's gang involvement and, during his testimony, he also read a Facebook message from Dustin, which was sent after Dustin became aware of Jenna's pregnancy, in which Dustin identifies himself as being involved with the gang and boasts about Jenna bailing him out of jail. Dustin acknowledged his involvement with a gang since a young age, including after learning of the pregnancy, but also testified that he got out of the gang in January 2012.

¶9 There was disputed testimony over whether Dustin at some point had reason to believe Jenna was planning to abort the pregnancy, but Dustin acknowledged that the pregnancy was reconfirmed for him in October 2011 when an adoption agency employee met with him at the jail to discuss Dustin giving up his parental rights to Breyanna. The employee left a business card with Dustin, but Dustin made no contact with the agency about Breyanna until May 2012. Dustin acknowledged during his testimony that he also made no effort to contact Jenna regarding the baby until he sent one letter to her in February 2012.

¶10 Without objection by Dustin's counsel, Jenna's counsel called a department of corrections (DOC) field supervisor who testified that Dustin's probation was revoked twice in 2009. She testified that the first revocation was based upon allegations that Dustin stole a check from a checking account he was not authorized to use, cashed a check made out to himself that he knew to be fraudulent, and attempted to pay a phone bill with a credit card he did not have permission to use. She explained that the second revocation was based upon allegations that Dustin stole and sold video game discs, damaged a room he had rented, and was not truthful with his agent regarding these incidents. On cross-examination by Dustin's counsel, the witness testified regarding February 2012

DOC records indicating Dustin was taking a parenting class while in prison; was on the wait list for substance abuse treatment; had a “good, positive, motivated” attitude; and “[w]ants to regain custody of his children.”

¶11 Jenna’s counsel also called to the stand a supervising officer from the prison where Dustin was incarcerated who testified as to one major and three minor rule violations Dustin committed while at the prison, with the major one resulting in weeks of disciplinary segregation. Dustin acknowledged these violations during his testimony.

¶12 Dustin called a county social worker who testified that another baby of Dustin’s, Colton, born April 2011, was placed by the county with Dustin’s mother, who was licensed for foster/kinship care, in December 2011 and was still in her care at the time of trial. The social worker testified that Dustin had been cooperative in her dealings with him, indicated his willingness to make improvements in his life, and desired to be “reunified” with his son upon release from custody. Upon cross-examination, the social worker stated she was aware of Dustin’s “criminal past” and “drug issues,” including his convictions for selling marijuana, and further testified that Dustin informed her that he has had treatment for drug addiction. She also testified that she did not believe Dustin was paying child support for Colton.

¶13 Dustin’s mother testified that she was currently taking care of Colton and could take care of Breyanna as well until Dustin was “ready and on his feet and able to do so.” She stated that Dustin loves his children and has always paid child support for another child of his, Savannah. She acknowledged that she initially told the prospective adoptive parents for Breyanna that she was not

willing to have Breyanna with her and that she thought the plan for them to adopt Breyanna was a good one.

¶14 Dustin also testified to taking the parenting class while in prison and awaiting substance abuse treatment, and emphasized that he was motivated to change his life and “raise [Breyanna] and show her ... what it’s like to have a dad in her life, because I didn’t have my dad in mine.” He stated that even though he had not met Breyanna, he loved her and wanted to be a part of her life.

¶15 The jury found grounds to terminate Dustin’s parental rights due to his failure to assume parental responsibility, with one juror dissenting. In a subsequent dispositional hearing, the trial court concluded that terminating Dustin’s parental rights was in Breyanna’s best interests. Dustin subsequently filed a postdisposition motion challenging his trial counsel’s effectiveness, which the trial court denied after an evidentiary hearing. Dustin appeals. Additional facts will be provided as necessary.

Discussion

¶16 Parents in a contested termination of parental rights proceeding have the right to the effective assistance of counsel. WIS. STAT. § 48.23(2); ***A.S. v. State***, 168 Wis. 2d 995, 1004-05, 485 N.W.2d 52 (1992). To succeed on a claim of ineffective assistance, the aggrieved parent must show that counsel’s performance was deficient and that the deficiency prejudiced him or her. *See State v. Erickson*, 227 Wis. 2d 758, 768, 596 N.W.2d 749 (1999). To prove deficient performance, the parent must show that counsel’s specific acts or omissions were “outside the wide range of professionally competent assistance.” *See Strickland v. Washington*, 466 U.S. 668, 690 (1984). There is a strong presumption that the parent received adequate assistance and that counsel’s

decisions were justified in the exercise of reasonable professional judgment. *See State v. Domke*, 2011 WI 95, ¶36, 337 Wis. 2d 268, 805 N.W.2d 364; *State v. Kimbrough*, 2001 WI App 138, ¶¶31-35, 246 Wis. 2d 648, 630 N.W.2d 752. “Reviewing courts should be ‘highly deferential’ to counsel’s strategic decisions and make ‘every effort ... to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel’s challenged conduct, and to evaluate the conduct from counsel’s perspective at the time.’” *Domke*, 337 Wis. 2d 268, ¶36. Counsel’s performance is deficient only if the parent proves that counsel’s challenged acts or omissions were objectively unreasonable under all the circumstances of the case. *See Kimbrough*, 246 Wis. 2d 648, ¶35. To prove prejudice, the parent must demonstrate a reasonable probability that, but for counsel’s error, the outcome of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. If the parent fails to prove one prong, we need not address the other. *See id.* at 697. Whether counsel’s performance is deficient or prejudicial is a question of law we review de novo. *State v. Jeannie M. P.*, 2005 WI App 183, ¶6, 286 Wis. 2d 721, 703 N.W.2d 694.

¶17 Dustin contends his trial counsel was ineffective for failing to object to testimony related to his actions before he became aware in April 2011 that Jenna was pregnant with his child. Specifically, he argues that counsel should have objected to testimony regarding his March 2011 arrest in Illinois for an offense related to delivering marijuana; Jenna bailing him out of jail on April 1, 2011, by taking out high-interest loans and selling personal items; his actions contributing to Jenna losing her job at McDonald’s that same day, including Jenna’s testimony of him “dealing” marijuana in the McDonald’s parking lot; and his 2009 probation revocations. We conclude Dustin’s trial counsel was not ineffective and affirm.

¶18 At the posttermination evidentiary hearing, Dustin’s trial counsel testified that while she did not remember exactly why she did not object during the fact-finding hearing to Jenna’s counsel questioning Jenna and Dustin regarding Dustin’s March 2011 arrest, she believed it was in part due to a concern that objecting too often would lead the jury to believe “that you’re hiding something.” Though the trial court made no findings regarding trial counsel’s reasons for not objecting, trial counsel’s stated reason is supported by comments she made during the fact-finding hearing itself. In discussion with the court, outside the presence of the jury, regarding her failure to object on a different issue that arose early in the trial, counsel stated that she “didn’t want to, in front of the jury, object to every request or every question that [Jenna’s counsel] had.”

¶19 Trial counsel testified that she had twenty-four years of experience practicing law, primarily trial practice. A review of the transcript from the fact-finding hearing reveals that she was sensitive to concerns that evidence presented by Jenna’s counsel might not be relevant and could cast Dustin in a negative light. She also had reason to be concerned that excessive objections could lead the jury to believe Dustin was trying to “hid[e] something.” For example, Dustin’s counsel objected on relevancy grounds in front of the jury to questioning of Jenna’s first witness regarding her relationship with Dustin, arguing outside the jury’s presence that the questioning served no purpose other than to “cause prejudice to my client that he has another woman who thought she was pregnant by him.” Dustin’s counsel then objected on relevancy grounds in front of the jury to questioning of Jenna’s third witness, Patrick, regarding how Dustin contacted Patrick after Jenna had broken up with Dustin and began seeing Patrick again. The objection was overruled, and Patrick testified regarding Dustin’s exchange of messages with him on Facebook. Then, at the end of Patrick’s testimony, when Jenna’s counsel

moved for an exhibit with the Facebook messages to be admitted into evidence, Dustin's counsel objected again, arguing in front of the jury that only the portions of the document about which Patrick had testified should be admitted. Dustin testified next, and it was during this testimony that Jenna's counsel first raised the question regarding his March 2011 arrest. Trial counsel's concern that objecting to questioning regarding Dustin's March 2011 arrest could give the jury a troubling impression that Dustin was trying to "hid[e] something" was a reasonable one. Counsel's performance was not deficient for failing to object.

¶20 Dustin also complains of his trial counsel's failure to object to testimony regarding Jenna bailing him out of jail on April 1, 2011, his actions contributing to Jenna losing her job at McDonald's that same day and his "dealing" marijuana in the McDonald's parking lot, and his 2009 probation revocations. Based on our review of the record, we conclude Dustin was not prejudiced by counsel's failure to object to this testimony.

¶21 Although Dustin contended he quit using and selling drugs upon learning of the pregnancy, the jury had before it significant evidence from multiple witnesses that Dustin had a long history of using marijuana, including testimony by Jenna that this use continued in her presence on a daily basis even after he learned she was pregnant. Dustin does not contest evidence informing the jury that he was in prison for two convictions for manufacturing and delivering marijuana; that even after learning Jenna was pregnant, he engaged in "slashing ... tires and breaking into people's cars and houses," resulting in convictions for theft, criminal damage to property, and disorderly conduct; that these actions contributed to Dustin's incarceration; that he had been charged as a "repeater," meaning he had "re-offended"; and that he was a long-standing member of a gang

and the membership continued even after he learned of Jenna's pregnancy, though he testified that he eventually left the gang.

¶22 The jury heard that Dustin provided Jenna no financial support after learning of the pregnancy,³ never paid for food or expenses while they lived together, and made no efforts until February 2012, months after Breyanna was born, to inquire about the status of the pregnancy, whether Jenna aborted the baby, or how the baby was doing.

¶23 The jury heard of an incident that occurred after Dustin learned of the pregnancy in which he endangered himself, Jenna, and their unborn child by repeatedly trying to jump out of the car Jenna was driving, ultimately resulting in minor injury to Jenna and her walking to a gas station and having her father pick her up. It further heard that police became involved because a third party indicated Dustin had struck Jenna. The jury also learned that Dustin had committed one major and three minor rule violations in prison subsequent to his learning of the pregnancy.

¶24 The trial court instructed the jury regarding its decision on whether Dustin had failed to assume parental responsibility and that, to prove this, Jenna had to establish that Dustin did not have a "substantial parental relationship" with Breyanna. Consistent with the relevant statute, WIS. STAT. § 48.415(6), and case law, the court instructed the jury as follows:

³ Our review of the fact-finding hearing indicates that testimony regarding money Jenna paid to bail Dustin out of jail provided important context for relevant testimony that Dustin offered her no financial support after learning of the pregnancy. Testimony at the fact-finding hearing indicated that not only did Dustin fail to support the mother of his expected child or his child after learning of the pregnancy, related to this, he also did not pay her back for loans she took out, i.e., continuing debts she incurred, to bail him out of jail at his request.

“[S]ubstantial parental relationship” means the acceptance and exercise of significant responsibility for the daily supervision, education, protection and care of Breyanna []. Substantial parental relationship is assessed based on the totality of the circumstances throughout the child’s entire life. In evaluating whether Dustin [] has had a substantial parental relationship with the child, you may consider factors, including but not limited to, whether Dustin [] has expressed concern for or interest in the support, care or well-being ... of Breyanna [], whether Dustin [] has neglected or refused to provide care or support for the child, whether Dustin [] exposed the child to a hazardous living environment, whether, with respect to a person who is or may be the father of the child, the person has expressed concern for or interest in the support, care or well-being of the mother during her pregnancy, and all other evidence bearing on that issue which assists you in making this determination. You may consider the reasons for the parent’s lack of involvement when you assess all of the circumstances throughout the child’s entire life.

The evidence in this case indicates that Dustin [] was incarcerated during some of the periods of time under consideration in this case. Incarceration of a parent ... does not in itself establish failure to assume parental responsibility.

In determining whether an incarcerated parent has or does not have a substantial parental relationship with the child, in addition to the considerations indicated in other parts of this instruction, you may consider the following factors and all other evidence bearing on this issue.

The reasons for incarceration; the nature of the underlying criminal behavior; whether the parent engaged in that behavior knowing that the resultant incarceration or potential incarceration would prevent or hinder the parent from assuming his or her parental responsibilities.

Efforts to establish a substantial parental relationship despite incarceration, including but not limited to:

Whether the parent offered to pay child support and the parent’s financial ability or inability to do so;

Requests for visitation with the child and, if permitted, the success and quality of those visits;

Appropriate efforts to communication [sic] with the child or with those responsible for the care and welfare of

the child; whether any such efforts were prohibited or impeded by other individuals;

Requests or absence of requests for information relating to the child's education, health and welfare;

Responsiveness or lack of responsiveness of the parent to efforts ... if any, of others to involve the parent in the life of the child;

Efforts, or lack of efforts, to enlist available, appropriate family members or friends in meeting the physical, financial and emotional needs of the child; the extent and success of any such efforts.

¶25 In denying Dustin's posttermination motion, the trial court emphasized that "the overwhelming amount of credible evidence supported the jury's finding." We agree. Considering the substantial unchallenged evidence the jury had before it related to actions Dustin took or failed to take after learning of Jenna's pregnancy, Dustin has not demonstrated a reasonable probability that, but for his trial counsel's failure to object to the challenged testimony, the outcome of the fact-finding hearing would have been different. *See Strickland*, 466 U.S. at 694.

¶26 Dustin alternatively contends that we should order a new trial in the interest of justice because "the real controversy has not been fully tried" or "it is probable that justice has for any reason miscarried." He offers nothing new on this point, but argues that the challenged testimony "distracted or misled" the jury in its task of determining whether Jenna had proven grounds to terminate. We disagree. The trial court properly instructed the jury on the factors it was to consider in making its determination and there was ample evidence supporting the jury's verdict. The challenged evidence, even if it had been improperly admitted, which we do not decide, was not so substantial as to leave us with concerns regarding the fairness of the trial. *See State v. Goetsch*, 186 Wis. 2d 1, 22-23, 519

N.W.2d 634 (Ct. App. 1994) (a simple “rehash of ... argument as to the ineffective assistance of counsel” will not support the grant of a new trial).

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

